No. 28.

Brf. of Bell for Def.

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In Supreme Court of the United States,

OCTOBER TERM, 1902.

W. T. WAGGONER, PLAINTIFF IN ERROR,

No. 28. vs.

J. M. FLACK, DEFENDANT IN ERROR.

IN ERROR TO THE COURT OF CIVIL APPEALS, FOR THE SECOND SUPREME JUDICIAL DISTRICT OF TEXAS.

ARGUMENT OF THE ATTORNEY GENERAL OF THE STATE OF TEXAS ON BEHALF OF THE DEFENDANT IN ERROR.

C. K. BELL,
Attorney General of the State of Texas,
on the part of J. M. Flack, Defendant
in Error.

VON BOECKMANN, SCHUTZE & CO., PRINTERS, AUSTIN, TEXAS.

In Supreme Court of the United States,

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Upon a careful consideration of the brief and argument of plaintiff in error in this cause, and of the terms of the statute upon the provisions of which the argument turns, it is suggested that there has possibly been in the presentation of this case, both in the State court and in this court, a misconception of the purpose and meaning of the Act of February 19, 1885. The decision of the Supreme Court of Texas in Berrendo Stock Co. vs. McCarty, 85 Tex. Rep., 412, has been accepted without question notwithstanding the criticisms of the opinion in that case in Anderson vs. The Bank, 86 Tex. Rep., 619, and Fristoe vs. Blum, 92 Tex. Rep., 85. I do not think the ruling on this point of the State Supreme Court in Berrendo Stock Co. vs. McCarty should be followed by this court. I think we are justified in saying that it would not now be followed by the Supreme Court of Texas.

I am persuaded that a brief statement of the various

provisions of the statutes on this subject will lead to this conclusion.

The Act of 1879 is entitled, "An Act to provide for the sale of the alternate sections of land in organized counties, as surveyed by railroad companies and other works of internal improvement, and set apart for the benefit of the common school fund; to provide for the investment of the proceeds, and to repeal all laws in conflict therewith."

After various provisions with regard to the sale of the lands referred to in the title, Section 12 of the act is as follows:

Sec. 12. "If, on the first day of March following the maturity of any payment, the interest on money due has not been paid to the State Treasurer, and his receipt filed with the Commissioner of the General Land Office, as provided in section eleven of this act, it shall be the duty of said Commissioner to notify the county or district attorney of the county in which such land is situated of such failure, giving the name of the purchaser so failing to make payment, with the amount and date of his note, and the amount of principal and interest due at the time of such failure; and upon the receipt of such notice it shall be the duty of the county or district attorney to cause a writ to be issued and served on the purchaser, or, in case of his death, upon his heirs or legal representatives, requiring him or them to show cause why he or they should not be ejected from such land; and upon his or their failure to show that the annual installments of interest have been paid, as above provided, a judgment shall be rendered against him or them, and a writ of possession shall be issued in favor of the State. That a copy of such judgment, under the signature and seal of the clerk of the court rendering the judgment, shall be forwarded to the State Treasurer, who shall immediately endorse the obligation of such purchaser "forfeited," note the fact of such endorsement on the copy of judgment aforesaid, and forward the same to the Commissioner of the General Land Office. The said Commissioner shall file said copy of judgment with the claim of such defaulting purchaser, and shall note such forfeiture on the account kept with said purchaser, and shall notify of the county in which said land is situated

that said land is again for sale." Chapter 28, Acts 16th Legislature, Session Acts 1879, p. 23.

The title was amended in 1881, so as to include school lands in unorganized as well as organized counties. Certain other provisions were also amended, but such amendments are immaterial to the present discussion. Chapter 105, Acts 17th Legislature, Session Acts 1881, p. 119.

The next act is the Act of 1883, entitled, "an Act to provide for the classification, sale and lease of the lands heretofore set apart for the benefit of the Common School, University, the Lunatic, Blind, Deaf and Dumb and Orphan Asylum funds.

This act superseded the Act of 1879 as to sales thereafter to be made. Section 10 of the act is as follows:

Sec. 10. "If upon the first day of March of any year the interest due remains unpaid the custodian of the obligation of the purchaser shall endorse on it "lands forfeited," and the account kept with the purchaser shall show such failure to pay and such forfeiture; the failure to pay the interest shall *ipso facto* work a forfeiture and the entry on the account shall be evidence of the fact, and there shall be no necessity for judicial ascertainment of the facts of the forfeiture; and no defaulting purchaser or those claiming under him, shall evade or avoid the effect of such forfeiture at once by reason of any statute or law, which for coverture, infancy or the like would otherwise give them additional time for payments or action, except as follows: Should any purchaser die, the representatives or heirs of the deceased shall have one year within which to pay the interest due on the first of March next after such death." Chap. 88, Sec. 10, Acts Regular Session 18th Leg., Laws 1883.

On February 16th, 1885, the following act was passed (As it is short it is here copied in full):

An Act to amend Sections 9 and 10 of an act entitled "An Act to provide for the classification, sale and lease of the lands heretofore or hereafter surveyed and set apart for the benefit of the Common School, University, the Lunatic, Blind, Deaf and Dumb and Orphan Asylum funds."

"Section 1. *Be it enacted by the Legislature of the State of Texas*: That Sections 9 and 10 of an act entitled "An

Act to provide for the classification, sale and lease of the lands heretofore or hereafter surveyed and set apart for the benefit of the Common School, University, the Lunatic, Blind, Deaf and Dumb ond Orphan Asylum funds" be and the same are hereby amended so as to hereafter to read as follows:

Section 9. The purchaser shall pay at once to the person selling for the State or to the State Treasurer as the Board may determine and within such time as it may fix, one thirtieth of the amount bid and execute his obligation for the remainder of the purchase money payable to the State of Texas and binding the purchaser to pay one thirtieth of the whole price on the first day of each succeeding year until the whole is paid, and interest at the rate of five per cent. per annum on the whole unpaid purchase money from date payable annually on or before the first day of March of each year; and provided, that after the expiration of seven years the purchaser shall have the option to pay the unpaid principal; and provided, that a failure to pay the annual installments of principal shall not work a forfeiture until the whole sum is due; provided, that upon proof of actual occupation, use and improvement for three consecutive years, the purchaser shall be permitted to pay all of the purchase money remaining unpaid; provided, also, that if the payment of the annual installments of interest be made by the first day of August succeeding the first day of March when the same became due then no forfeiture shall result or be taken for such delay in such payment: provided further, that any person acting as agent or attorney for another in the purchase of any of said lands shall file with the person authorized to sell a legally executed power of attorney from his principal or other instrument in writing from a court of competent authority to invest him with powers to consummate a contract.

Section 10. If upon the first day of August of any year the interest due on the first day of the previous March remains unpaid the custodian of the obligation of the purchaser shall endorse on it 'lands forfeited.' and the account kept with the purchaser shall show such failure to pay and such forfeiture; the failure to pay the interest by the first day of August following its maturity shall *ipso facto* work a forfeiture and the

entry on this account shall be evidence of the fact and there shall be no necessity for judicial ascertainment of the facts of the forfeiture; and no defaulting purchaser or those claiming under him shall evade or avoid the effects of such forfeiture at once by reason of any statute or law, which for coverture, infancy or the like would otherwise give them additional time for the payments or action, except as follows: Should any purchaser die the representatives or heirs of the deceased shall have one year within which to pay the interest due on the first day of March next after such death.

Section 2. The fact that this act should take effect before the first day of March, 1885, in order to avoid forfeitures which otherwise might be taken at that time creates an emergency and an imperative public necessity that the rules requiring bills to be read on three several days be suspended and that this act take affect from and after its passage, and it is so enacted." Chapter 12, Acts 19th Leg., Session Acts 1885, p. 13.

On February 23, 1885, the following act was passed, which, being short, is also copied in full:

An Act to prevent the forfeiture of the rights of purchasers of Public Free School, University or Asylum land.

Section 1. *Be it enacted by the Legislature of the State of Texas:* That the failure of a holder of public free school, University or asylum land, under contract of purchase from the State, to make the annual payments of principal or interest thereon prior to the first day of August after the same becomes due shall not cause a forfeiture of the rights of such holder in such land.

Section 2. The near approach of the close of the session and the importance of this bill to many citizens of this State, create an imperative public necessity and emergency authorizing the suspension of the constitutional rule requiring bills to be read on three several days, and demanding that this act take effect from and after its passage, and it is so enacted." Chapter 17, Acts 19th Leg., Session Acts, 1885, p. 18.

It seems to have been assumed that this last act had the effect to repeal the forfeiture provisions of the Acts of 1879 and of 1883, so that there remained, after its

passage, no statutory provision for the forfeiture of lands for non-payment of interest.

Such, it is submitted, was not its purpose or effect.

Let us see what was the state of the law with regard to this matter at the time of the passage of this law.

The interest on lands sold under the Act of 1879 was required to be paid by *March first*, and in case of failure a forfeiture by judicial procedure was provided for.

The interest on lands sold under the Act of 1883 was required by the terms of Section 10 of that act to be paid also by *March first*, and in the event of failure, the Commissioner of the General Land Office was authorized to declare the lands forfeited.

This Section 10 of this Act was amended by the Act of February 16, 1883, postponing the time of payment, so as to avoid the forfeiture, to *August first*.

This clearly applied only to sales made under the Act of 1883, leaving the time of payment of interest of lands sold under the Act of 1879, as provided in that Act, to-wit: *March first*. After which date, the interest being unpaid, proceedings might be instituted for forfeiture.

In order to put all purchasers of public lands, whether under the Act of 1883 or 1879, upon the same footing as to time of payment of interest, the last named Act of February 23, 1885, was passed, providing that the failure of "*a holder of public free school, University or asylum land, under a contract of purchase from the State*, to make the annual payments of principal or interest thereon *prior to the first day of August*, after the same becomes due, shall not cause a forfeiture of the rights of such holders in such land."

The attention of the court is called to the language of this act. It does not provide that a failure to pay the interest or principal shall not cause a forfeiture, but that failure to pay *prior to the first day of August*, shall not cause a forfeiture.

Now that is just what was provided by the preceding Act of February 16th, passed only seven days before, with regard to lands sold under the Act of 1883. That act provided that failure to pay by the first day of August shall, *ipso facto*, work a forfeiture as to lands sold (under that Act of 1883). Of course it follows that failure to pay "prior to the first day of August" would not cause a

forfeiture and as to sales under the Act of 1883, this Act of February 23rd made no change in the law; they still remained subject to forfeiture if the interest was not paid by the first day of August, but not for failure to pay prior to that date.

By the terms of the last act, however, sales made under the Act of 1879, which, without this act were subject to forfeiture (by judicial proceedings) for failure to pay interest *by March 1st*, were not subject to such forfeiture for failure to pay *prior to the first day of August*, but were subject to forfeiture as in the original act for failure to pay by the first day of August. This Act of February 23rd therefore had merely the effect of allowing all holders of school, etc., lands until August 1st to pay interest instead of March 1st, as previously provided as to some of such purchases. The language is, "the failure of a holder of public free school, University or asylum land," etc., thereby expressly including all purchasers of such land under any laws for that purpose, including purchasers under the Act of 1879, who without this act would have been required to pay by March 1st to save the forfeiture.

The policy of the Legislature to authorize the Land Commissioner to declare a forfeiture, without judicial proceedings, was inaugurated by the Act of 1883, departing from the policy of judicial forfeiture as declared in the Act of 1879. On the sixteenth of February 1885, this policy is still adhered to by the amendment of that date of Section 10 of the Act of 1883, which merely postponed the date of payment and of forfeiture. Is it reasonable to suppose that within seven days, towit, on the 23rd of February, 1883, the Legislature would have departed so entirely from this policy as to provide that failure to pay interest or principal should not cause a forfeiture at all? And in this connection it is to be remarked that every act for the sale of the public lands passed by the Legislature of Texas since this Act of 1879, has provided for a forfeiture by the Land Commissioner for failure to pay interest by a certain named date, such date having, however, been sometimes extended, and liberal provisions made for reinstatement, etc.

This shows the uniform policy which has prevailed, and which is, we contend, in keeping with the interpre-

tation of the language of the Act of February 23, 1885, herein contended for, and entirely inconsistent with the interpretation assumed by plaintiff in error (and also by the State court) to be correct.

It may be suggested that the title of this Act shows a different intention on the part of the Legislature. This title is "An Act to prevent the forfeiture of the rights of purchasers of public free school, University and asylum land," and it may be argued from this that the effect of the act, if construed as we have contended, would be to postpone and not to prevent such forfeitures. This we do not think should control the intent and meaning of the act as clearly shown by its terms, when taken in connection with other legislation *in pari materia.* (Price vs. Forrest, 173 U. S., 410-427).

This precise point seems not to have been raised in this case in the State courts. It rather seems to have been assumed that the Act of February 23, 1885, was intended to relieve purchasers entirely of the condition of forfeiture for failure to pay interest, and the only question was whether the subsequent Act of 1897, authorizing such forfeitures was an impairment of the obligations of the contract, which question could not have arisen, if the Statute be construed as is here construed. It is submitted that there has been no such construction of the Statute upon the point here arising, by the courts of the State, as would be binding upon this court, or prevent this court from giving to the Act the construction here contended for.

If this be the correct interpretation of this Act, the whole case of plaintiff in error falls to the ground. Having failed to pay the interest due, as shown by the record, by the first day of August, 1897 (no interest having in fact been paid since 1893. Record, p. 5), on the 20th day of August the land was forfeited by the Land Commissioner and sold to the defendant in error on November 17, 1897.

In the brief and argument on the part of the State of Texas, heretofore filed herein, counsel for the State seems to have fallen into the same misconception as to the meaning of the Act of February 23, 1885; resting upon the decision in Berrendo Stock Co. vs. McCarthy, 85 T. R., 412. A more careful consideration of its terms, how-

ever, has led to the conclusions here advanced, and to the further conclusion that there is nothing in the rule that this court will follow the settled construction placed by the highest court of a State upon its statutes, to require this court now to follow the construction placed upon this statute by the Supreme Court of Texas in the above case.

It is not denied that in that case it was held by our Supreme Court that the Act of February 23, 1885, repealed the provisions of Section 10 of the Act of 1883 with regard to forfeiture, and that after the passage of that act there was no provision for forfeiture for non-payment of interest.

The contrary was held by the Court of Civil Appeals in that case (20 S. W. Rep., 934), in accordance with the views here expressed, to which we beg to call the attention of this court.

In the case of Anderson vs. The Waco State Bank, 86 T. R., 619, at least a shade of suspicion is thrown over the soundness of the conclusions announced in the Berrendo case. The Berrendo case was afterwards followed, seemingly without question, upon this point, by the Court of Civil Appeals in Patterson vs. O'Docherty, 28 S. W. Rep., 293; Cuba vs. Island City Savings Bank, 41 S. W. Rep., 532, and other cases, but in the late case of Fristoe vs. Blum, 92 T. R., 85, a broad intimation is thrown out by the Supreme Court of the State that the court does not consider the opinion in the Berrendo case as sound.

In the opinion in Fristoe vs. Blum (p. 81) the court says: "For the purposes of this case we accept the proposition that between February 23, 1885, and the passage of the Act of April 1, 1887, there was no law in force which empowered the Commissioner of the General Land Office to declare the forfeiture of this class of contracts." The court then proceeded to decide the question involved upon principles which make it entirely immaterial whether the proposition above stated was correct or not. Before concluding the opinion, however, the court says (p. 85): "We therefore do not hesitate to say that the decision in the case of Berrendo Stock Co. vs. McCarty is not authority upon the question now presented to this court. We have considered this case upon the assumption that the decision in Berrendo Stock Co. vs. McCarty is correct,

but should the same question hereafter arise, the opinion will not be considered as approving that case."

This must be regarded as destroying the effect of the Berrendo case as a conclusive settlement of the question here presented, and to leave this court free to adopt the construction of the act of February 19, 1885, here contended for.

There is no doubt that, if it had been necessary to do so in supporting the conclusions arrived at in Fristoe vs. Blum, the Supreme Court would have overruled the decision in the Berrendo case, instead of intimating that in a proper case they would do so.

If the court cannot agree with counsel for the State, however, as to the interpretation of this act; in so far as concerns the other question which arises upon a contrary interpretation, towit: that the Act of 1897, under which the forfeiture is claimed to have been declared, impairs the obligation of the contract of sale; we rest the case upon what has been advanced in the brief and argument hereinbefore filed for the State of Texas, and upon the opinion of this court in the case of Wilson vs. Standefer therein referred to.

Inasmuch as the brief referred to and heretofore filed in this court was not printed in accordance with the rules adopted by the court, the same is here reprinted and filed.

Respectfully submitted,

C. K. BELL,

Attorney General of the State of Texas, on the part of J. M. Flack, Defendant in Error.

Supreme Court of the United States.

OCTOBER TERM, 1901.

No. 149.

W. T. WAGGONER, PLAINTIFF IN ERROR

vs.

J. M. FLACK, DEFENDANT IN ERROR.

IN ERROR TO THE COURT OF CIVIL APPEALS FOR THE SECOND SUPREME JUDICIAL DISTRICT OF THE STATE OF TEXAS.

BRIEF OF C. K. BELL, ATTORNEY GENERAL OF THE STATE OF TEXAS.

In this cause the defendant in error, J. M. Flack, does not appear in this court by brief of counsel or otherwise.

On February 4, 1902, the following order was made herein:

"Notice of the pendency of this cause directed to be given to the Attorney General of Texas, and leave is given to file briefs for defendant in error within twenty days. Counsel for plaintiff in error is required to file printed copies of statutes referred to."

And afterwards this court was kind enough to extend the time for filing brief by the Attorney General of Texas to thirty days.

The question involved in this case is one of very great public importance in the State of Texas, inasmuch as a decision of this question in favor of plaintiff in error

would necessarily result in the setting aside of all forfeitures of public lands falling under the same conditions as presented herein and the cancellation of all sales made of such lands after declaration of forfeiture by the Commissioner of the General Land Office.

For this reason, the State of Texas avails herself of the opportunity so kindly presented by this court in the order herein quoted and submits, briefly, in support of the judgment rendered in this cause in the State courts the following:

It is submitted *in limine* that the sole question to be decided has been decided by this court at the present term in the case of T. K. Wilson vs. J. F. Standifer, No. 105, opinion rendered March 3, 1902. In the opinion in that cause this court quotes with approval from the opinion of the Supreme Court of Texas, and concludes as follows:

"Upon the whole, we agree with the conclusion of the Supreme Court of Texas, that no contract rights of a purchaser under the Act of 1879 were impaired by the provisions of the subsequent Act of 1897; that the twelfth section of the Act of 1879 was not, in legal contemplation, a stipulation by the State that the only remedy which might be resorted to by the State was the one therein provided for; that, in the language of Chief Justice Marshall, 'the distinction between the obligation of a contract and a remedy given by the Legislature to enforce that obligation exists in the nature of things, and without impairing the obligation of the contract, the remedy may certainly be modified as the wisdom of the nation may direct.'"

I shall endeavor here simply to show that the case at bar falls clearly within the principle here decided.

As in the case of Wilson vs. Standifer, the forfeiture here complained of as being violative of the Constitution of the United States, was had by the Commissioner of the General Land Office under the provisions of the Act of 1897, which provided for "office forfeitures," as distinguished from "judicial forfeitures" of lands sold, in case of failure to pay interest.

This act is, as shown in the brief for W. T. Waggoner, plaintiff in error, on page 7, "That if upon the first day of November of any year any portion of the interest due

by any person to the State of Texas, for lands heretofore sold by the State of Texas, whether said lands be a part of the public domain or shall have been heretofore set apart for the public schools, University, or any of the other various State institutions, has not been paid, it shall be the duty of the Commissioner of the General Land Office to endorse on the obligation for said lands, 'Lands Forfeited,' and shall cause an entry to that effect to be made on the account kept with such purchaser, and thereupon said land shall thereby be forfeited to the State, without the necessity of re-entry or judicial ascertainment, and shall revert to the particular fund to which it originally belonged, and be resold under the provisions of the existing law, or any future law; provided, the purchaser of said land shall have the right at any time within six months after such endorsement of 'Land Forfeited' to institute a suit in the district court of Travis county, Texas, against the Commissioner of the General Land Office, for the purpose of contesting such forfeiture and setting aside the same, upon the ground that the facts did not exist authorizing such forfeiture, but if no suit has been instituted as above provided, such forfeiture of the Commissioner of the General Land Office shall then become fixed and conclusive; provided, that if any purchaser shall die, his heirs or legal representatives shall have one year in which to make payment after the first day of November next after such death," and is referred to in the opinion of this court in Wilson vs. Standifer, page 4 (paragraph 12 of statement of facts quoted in the opinion).

In each case there was a forfeiture of the land by the Commissioner of the General Land Office without judicial ascertainment and afterwards a sale to the defendants in error, respectively.

In the case of Wilson vs. Standifer the sale afterwards canceled for failure to pay interest was made under the Act of July 8, 1879.

This statute does not give to any officer of the State the right to declare a forfeiture of sales made thereunder for failure to pay interest, but, on the contrary, the act, in Section 12, expressly provided for a suit in the district court by the county or district attorney on the part of the State, in case of such failure. It was contended

by plaintiff in error in Wilson vs. Standifer that this provision as to judicial forfeiture was part of the contract of sale under that act, which could not be abrogated by a subsequent act providing for a declaration of forfeiture by the Commissioner of the General Land Office without judicial action. This contention was overruled by this court.

In the case at bar the sale was made under the Act of 1883, Section 10 of which expressly provided for a declaration of forfeiture by the Commissioner of the General Land Office without judicial ascertainment, for non-payment of interest, by March 1, 1883.

By an amendment of this section in 1885, August 1st was fixed as the date of payment instead of March 1st, as in the original act. Previous to the sale of the section of land involved in this suit, however, the Act of February 23, 1885, was passed. This act is set out in brief of plaintiff in error (pp. 5 and 6). The first section of this act is as follows:

"Section 1. Be it enacted by the Legislature of the State of Texas: That the failure of a holder of public free school, University or asylum land under contract of purchase from the State, to make the annual payments of principal or interest thereon prior to the first day of August after the same becomes due shall not cause a forfeiture of the rights of such holder in such land."

So the question is, is this provision a part of the obligation of the contract between the State and a purchaser of public land, entered into while this act was in force, to such an extent as to preclude the Legislature from afterwards providing for a forfeiture or rescission of such sales by the State through the proper officer without judicial ascertainment?

While this question was not directly passed upon by the Supreme Court of Texas in Fristo vs. Blum, 92 Texas, 76, as the sale in that case was made under the Act of 1883, prior to the passage of the Act of 1885 above recited, the opinion in that case is broad enough, and certainly was expressly intended to be broad enough, to embrace sales made under that act after the passage of the Act of 1885.

The following expression from the opinion of the

Supreme Court of Texas in Fristo vs. Blum, *supra*, is here quoted (pp. 83-84):

"But it is said that a construction of section 11, which would give to the Commissioner of the General Land Office the authority to enter a forfeiture as in this case would render the act unconstitutional, because it would be giving to it a retroactive effect by which it would violate the obligation of the contract. A sufficient answer, so far as this case is concerned, to that proposition would be that this contract was entered into when such a law existed and provided for the doing of the very thing that the Commissioner has done, and the repeal of that law could not constitute on the part of the State an obligation that it should not be restored in the future. We prefer, however, to put this decision upon the broad ground and stronger position that where a right exists the Legislature may give a new remedy, provided it does not deprive either party of a substantial right. Sutherland vs. De Leon, 1 Texas, 305; Johnson vs. Taylor, 60 Texas, 362."

This will suffice to show the difference and the only difference between the case of Wilson vs. Standifer and the case at bar.

The Act of 1883 provided for forfeiture by the Commissioner of the General Land Office without the action of the courts. The Act of 1885 provided that the failure to make annual payment of principal and interest prior to August 1st, after the same becomes due, shall not cause a forfeiture of the rights of such purchaser.

Under the Act of 1883 the only remedy provided by which the State could rescind the contract and recover the land was the remedy of a declaration of forfeiture by the Commissioner of the General Land Office without judicial ascertainment. There is no express reservation of the cumulative remedy of judicial proceedings for that purpose, as in the Act of 1897, so that the most that can be said for the contention of plaintiff in error is, that after the passage of the Act of 1885, no remedy was provided *by statute* for rescission or forfeiture by the State in case of failure to pay interest on lands sold while the Act of 1885 was in force. In other words, the Act of 1885 repealed Section 10 of the Act of 1883. This did not bind the State, as an obligation of its contract of sale,

not to provide a remedy by future legislation with regard to such sales. (Fristo vs. Blum, 92 Texas, 84; Sturgis vs. Crowninshield, 4 Wheaton, 122.)

The only difference, then, between the case at bar and Wilson vs. Standifer is that in the former the sale was made under a statute which did not provide any remedy for failure to pay interest, while in the latter the sale was made under a statute which did provide a particular remedy, *i. e.*, by judicial proceeding for a rescission of the contract and the recovery of the land.

If, as declared in Wilson vs. Standifer, the Legislature might, without violating the obligation of the contract of sale, drastically change the remedy expressly provided in the statute under which the sale is made, it is respectfully submitted that there can be no sound reason for holding that it could not, by subsequent legislation, provide a remedy where none is given in the statute under which the sale is made.

If the remedy expressly given by Section 12 of the Act of 1879 was not a part of the contract, as held in the above case, then surely the elimination by the Act of 1885 of the statutory remedy given by Section 10 of the Act of 1883, cannot be said to be a part of the contract of sale under that act.

The repeal by the Act of 1885 of the provisions of Section 10 of the Act of 1883, left unimpaired the common-law right of rescission (Fristo vs. Blum, *supra*), taking away only the statutory remedy of forfeiture. The case is as if no remedy at all had been provided in that act. There was left the obligation of the purchaser to pay according to the terms of his contract, and the common-law remedy of the State for a rescission of the contract of sale for failure on his part to do so. After the sale in this case, the Legislature changed the common-law remedy, or rather adds to it the specific remedy of rescission by the act of the Commissioner of the General Land Office.

It is submitted that the case is clearly within the doctrine announced in Wilson vs. Standifer by this court and in Fristo vs. Blum, by the Supreme Court of Texas.

It is not too much to say that hundreds of titles of settlers on public lands in Texas will be overthrown if the contention of the plaintiff in error is sustained by this court. These titles rest upon a construction of the stat-

ute law of the State by the Supreme Court. We quote from the opinion of this court in Wilson vs. Standifer:

"But as the general rule is that the interpretation put on a State constitution or laws by the Supreme Court of that State is binding upon this court, and as our right to review and revise decisions of the State courts in cases where the question is an impairment by legislation of contract rights, is an exception, perhaps the sole exception, to the rule, it will be the duty of the court, even in such a case, to follow the decision of the State court when the question is one of doubt and uncertainty. Especial respect should be had to such decisions when the dispute arises out of general laws of a State, regulating the exercise of the taxing power, or relating to the State's disposition of its public lands."

It is respectfully submitted that the judgment of the Court of Civil Appeals of Texas should be affirmed.

C. K. BELL,
Attorney General,
T. S. REESE,
Assistant Attorney General,
Counsel for the State of Texas.